))

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6687 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

B B PATHAK

Versus

STATE OF GUJARAT

Appearance:

MR CJ VIN for Petitioner.

Ms. Manisha Lavkumar AGP for Respondent.

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 18/01/2002

CAV JUDGEMENT

The petitioner, in this petition, has challenged the order dated 5-12-1986 as well as the order dated 26-4-1988 on the ground that the order dated 5-12-1986 was passed without hearing the petitioner and in violation of the principles of natural justice. According to the petitioner, the order dated 26-4-1988 was passed by the respondent without giving any reason

whatsoever. The petitioner has therefore prayed for quashing and setting aside of these two orders. The petitioner has prayed for an interim relief to the effect that the respondent be directed to get one post vacant for the petitioner.

2. The petitioner has stated in the petition that he was appointed as Supervisor (Civil) on 1-11-1969 and he had joined his duties on 6-11-1969. The petitioner has further stated that pursuant to the letter dated 24.9.1971 issued by the Additional Collector, Songadh, he appeared before the Selection Committee and he was taken on the regular post with effect from 25.11.1971. It is the case of the petitioner that he had continuously worked since 6.11.1969 without any break and hence his name should be considered from the date of his joining in service on temporary post as Supervisor (Civil) with effect from 6.11.1969.

3. The petitioner further stated in the petition that considering his continuous service with effect from 6.11.1969, the date of joining the service given to the petitioner in the seniority list published on 27.2.1984 was `1.11.1969' and accordingly seniority number given to the petitioner in the said list was 717. It was further stated by the petitioner that subsequently on 5.12.1986, the Under Secretary, Narmada Development Division has taken the view that by mistake the petitioner's date was considered as `6.11.1969' instead of `25.11.1971' and hence the petitioner's position in the seniority list was changed from Serial No. 717 to 987-A.

4. The petitioner was aggrieved and dissatisfied with the said decision and hence made a representation to the said authority on 24.3.1987. However, the respondent authority has come to the conclusion vide his order dated 26.4.1988 that there was no need to make change in the seniority list. Before such decision was communicated to the petitioner, the petitioner had already made another representation on 16-3-1988. However, since the respondent has already taken the decision pursuant to the petitioner's earlier representation, no further decision was taken on the second representation.

5. The petitioner, in the petition, has relied on the Government Circular issued by the Public Works Department on 17.11.1977 wherein it was stated that as per the Resolution of the Government of Bombay in Public Works Department dated 26.4.1960, orders were issued to the Overseers[now Junior Engineers/Supervisors/Overseers] the old practice of fixing the seniority on the temporary

establishment on the basis of pay and ordering confirmation accordingly to that seniority should be abandoned and the seniority should be fixed according to the date of their joining as Overseers without distinction between graduates, diploma holders and non-qualified persons. Accordingly, the seniority has to be fixed on the basis of continuous length of service rendered on temporary establishment and not on the basis of pay. Consequently, the services rendered on work-charge establishment prior to appointment on temporary establishment cannot be considered for the purpose of seniority. The Government therefore decided that in light of this position, the provisions contained in Para 92(Y) of the Public Works Manual, Volume I are rendered obsolete and were required to be deleted immediately on 24-6-1960. However, the said provision remained in the Manual through oversight. The Government has, therefore, directed to delete the provisions contained in Para 92(Y) of Public Works Department Manual, Volume I by issuing the Circular dated 17.11.1977. The petitioner therefore contended that Para 92(Y) of the Public Works Department Manual, Volume-I was in force from 26.4.1960 till 17.11.1977 and the petitioner was recruited during the period of this policy and hence his case was governed by the provisions contained in Para 92(Y) of the Public Works Department Manual, Volume-I.

6. The petitioner has further referred to the Resolution of the Government passed on 1.8.1978 which inter alia states that earlier services rendered on work-charge establishment was not required to be considered for the purpose of seniority and the date to be considered was their appointment on temporary establishment. In connection with this Resolution, a representation was made by the Junior Engineers as well as Supervisors that despite the fact that the Selection Committee was formed in 1962, local level Superintending Engineers had made appointment on temporary establishment as well as work-charge establishment and, therefore, number of employees who were on work-charge establishment had not got opportunity to come before the Selection Committee. It was also pointed out that despite the fact that in 1962 the Selection Committee was appointed upto 1966 this function had not been regularly started and that the seniority upto 30.6.1961 was published of the Junior Engineers/Supervisors/Overseers and in that list also services rendered on work-charge establishment was taken into consideration. The Government, having regard to the representation made by various representationists, decided that there should be modification in the Circular

dated 17.11.1977 and hence it was decided that those persons who were appointed on work-charge establishment between 1.7.1961 and 31.12.1972 and who have worked on the work-charge establishment during the aforesaid period without any break in service, should be considered for the purpose of seniority and the same was based on certain conditions.

7. On the basis of the aforesaid two documents, the petitioner has emphatically stated in the petition that the seniority number originally given to him was the correct one and it was not required to be changed. The petitioner has, therefore, contended that the services were rendered by him continuously from 6-11-1969 and his position in the seniority list was changed without giving him any opportunity of being heard. Even the representation made by him was also disposed in a cryptic manner and no reasons were given by the respondent authorities.

8. An affidavit-in-reply was filed on behalf of the respondent No.2 wherein it was stated that the impugned decision taken by the respondent authority was in consonance with rules for fixation of seniority applicable to the cadre and the post held by the petitioner and hence the said decision was legal, valid and proper and it could not have been subjected to challenge in the present petition. It was further stated in the affidavit-in-reply that by passing a special order dated 5.12.1986, the Government has corrected factual error in the matter of fixation of seniority of the petitioner and thereafter having received the representation of the petitioner, the same has been considered in light of the contentions raised therein, vis-a-vis the prevailing rules for fixation of the seniority and the decision of the respondent-authorities was communicated to the petitioner through proper channel. It was further stated in the affidavit-in-reply that since the petitioner has not requested for personal hearing the same was not granted to him.

9. The respondent No.2 has further stated in the affidavit that the appointment to the post of Supervisor (Civil, Mechanical and Electrical) in the Public Works Department was governed by the recruitment rules notified under Public Works Department Notification dated 26.10.1964 under which the post of Supervisor can be filled-in by nomination from amongst the eligible candidates. It was also stated in the affidavit-in-reply that the Government has set-up a Committee for selection to the post of Civil Junior Engineers and Supervisors and

also laid down procedures for recruitment by the Resolution dated 21.4.1966 wherein it was provided that the Superintending Engineer may appoint Junior Engineers/Supervisors on work-charge establishment after following the usual procedure, and such appointees may be taken up on temporary establishment only after they get themselves selected by the Committee set-up under the said Resolution. Thus, the Superintending Engineers were empowered to make ad-hoc arrangement till a candidate newly selected by the Selection Committee is made available. The Government by issuing the Resolution dated 20.8.1966 has added the requirement of educational qualifications of passing the last examination with at least 55% marks so as to become eligible for appointment on stopgap arrangement.

10. The respondent authorities have further submitted in the affidavit-in-reply that it was clear from the appointment order of the petitioner that he was appointed on temporary establishment and the appointment was clearly a stopgap arrangement till the department candidate was provided. It was clear from the Government Resolution dated 20th August 1966 that the Additional Collector was not empowered to make such temporary appointment on the regular-temporary establishment and it is only for this reason it was clearly stated in the appointment order dated 1.11.1969 that the appointment of the petitioner was by way of a stopgap arrangement till the regular candidate from the department was available. On the basis of these facts, it was submitted by the respondent authorities that the petitioner's services were treated as stopgap appointee as Supervisor and thereafter by communication dated 24.9.1971 the petitioner was called upon to appear before the Selection Committee and after his selection by newly constituted Selection Committee, he was appointed and posted in Ukai Circle, where he has joined his duties with effect from 25.11.1971. It was therefore submitted by the respondent authorities that the services rendered by the petitioner for the period between 6.11.1969 and 24.11.1971 were on stopgap arrangement as Work-Charge Supervisor and the petitioner was not entitled for counting the said service for the purpose of reckoning his seniority in the cadre of Supervisor.

11. With regard to Para 92(Y) of Gujarat Public Works Department Manual, Public Works Department Circular dated 17.11.1977, and Resolution dated 1.7.1978, it was submitted by the respondent authorities that by Circular dated 17.11.1977, the Government has directed to delete Para 92(Y) of the Gujarat Public Works Department Manual

and thereafter issued Resolution dated 1-8-1978 to consider work-charge services for the purpose of fixation of seniority in the cadre of Junior Engineer and Supervisor, with limitations specified in the Resolution. It was further submitted by the respondent authorities that the Government Resolutions dated 17.11.1977 and 1.8.1978 were challenged before this Court in Special Civil Application No. 2653 of 1978 wherein it was stated to be held that the Government Resolution dated 1-8-1978 was irrational and offered arbitrary and discriminatory treatment and hence the Government was restrained in giving effect to the rule of seniority embodied in the Resolution dated 1-8-1978. Accordingly, the Government, having reconsidered the orders contained in Resolutions dated 17.11.1977 and 1.8.1978, issued Resolution dated 8.5.1980 directing that the orders contained in Government Resolution dated 1-8-1978 counting work-charge service for the purpose of determining the seniority of subsequent appointment on temporary establishment in cases of Junior Engineers and Supervisors appointed on work-charge establishment from 1.7.1961 to 31.12.1972 should be treated as void, ab initio, and cancelled.

12. The respondent authorities have further stated in the affidavit-in-reply that as per the rules of fixation of seniority of the supervisors, the petitioner was entitled for seniority on the basis of his regular appointment as Supervisor, i.e., from 25.11.1971, and accordingly in the Seniority List published by the Government Circular dated 27.12.1984, the name of the petitioner was required to be placed between Serial No. 987 and 988. However, by mistake the seniority of the petitioner was fixed on the basis that he was appointed regularly on 6.11.1969. The respondent authorities have noticed this error and after minutely verifying the service record of the petitioner, passed the order dated 5.12.1986. It was therefore contended by the respondent authorities that by passing impugned order changing the seniority position of the petitioner, respondent authorities had corrected their error for which no personal hearing was required. Even otherwise, the request for personal hearing was not made by the petitioner. The respondent authorities have therefore submitted before this Court that the petition filed by the petitioner deserves to be dismissed.

13. I have heard Mr. C.J. Vin, learned advocate for the petitioner and Ms. Manisha Lavkumar, learned Assistant Government Pleader for the respondent.

14. Mr. C.J. Vin, the learned advocate for the petitioner in support of his contentions raised in the

petition, has relied on the decision of the Hon'ble Supreme Court in the case of Keshav Deo and another Vs. State of U.P. and Others, reported in AIR 1999 S.C. Page 44, wherein Uttar Pradesh Services of Engineers (Buildings and Roads Branch) Class II Rules (1936) (as amended in 1969 and 1971), have come up for consideration before the Hon'ble Supreme Court. The question of seniority of the appellants arose in the light of Rule 23(d) of the said Rules. The appellants were promoted on ad-hoc basis and they were fully qualified and continued to work uninterruptedly on the post till they were selected and approved by Commission. The question as to whether the period of service rendered by appellants/ad-hoc promotees before appointment in accordance with Rules, i.e. with consultation of Commission can be counted for purpose of determining seniority and after considering the various judgments cited by the respective parties and referred to therein, the Hon'ble Supreme Court has taken the view that the seniority so fixed by the authorities were in conformity with the Rules. The petitioner has further relied on the Judgment of the Supreme Court in the case of Ajit Kumar Rath Vs. State of Orissa and Others, reported in AIR 2000 S.C. 85, wherein Orissa Service of Engineer Rules (1941) have come up for consideration before the Hon'ble Supreme Court. Rule 26 of the said Rules deals with the seniority. The appellant in that case was promoted to the post of Assistant Engineer in accordance with Rules against the permanent vacancy and was given ad-hoc promotion pending concurrence of Public Service Commission. The respondents were directly recruited as Assistant Engineers in the same year. In view of the provisions contained in Rule 26, the appellant-promotees would rank senior to the direct-recruits-respondents. In this background, the Hon'ble Court has held, that the appellant was promoted on a regular, though provisional basis pending concurrence from the Orissa Public Service Commission. The promotion having been made in accordance with the Rules, the entire period of ad-hoc service beginning from 1972 to 1976, when the appellant was appointed on a regular basis on the concurrence of the Commission, would have to be counted towards the seniority of the appellant vis-a-vis the contesting respondents. The Tribunal, in these circumstances, had rightly invoked the principles laid down by the Hon'ble Supreme Court in Direct Recruit Class-II Engg. Officers Association's case [AIR 1990 SC 1607]. The Court has further observed that there was no scope to deviate from this Rule as it has been clearly laid down by this Court in principles (A) and (B) set out therein as under :

"(A). Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

"(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

15. The Hon'ble Court has further pointed out in the above decision that the Constitutional Bench decision in Direct Recruit Class-II Engg. Officers Association's case was considered by a 3-Judge Bench of the Hon'ble Supreme Court in the State of West Bengal Vs. Aghore Nath Dey [1993] 3 SCC 371 and principles (A) and (B) were explained as under :

"There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed `according to rules'. The corollary set out in conclusion (A), then is, that `where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority'. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the writ

petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority."

27. It was also explained as under :

"The conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, `if the initial appointment is not made by following the procedure laid down by the `rules' and the latter expression `till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of item or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rule has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest".

16. If one applies the ratio of the above two

decisions in the context of the facts found in the petitioner's case, it is clear that the case of the petitioner squarely falls within the corollary and conclusion (A), as the petitioner was appointed purely on a temporary post and his appointment was only by way of stopgap arrangement. Again his appointment was not as per the rules prescribed, as the person who has appointed the petitioner was not having the legal authority to appoint. The petitioner was legally appointed only when he was called for personal interview and pursuant to that call he appeared before the Selection Committee and he was selected for a regular post. In other words, the petitioner's seniority would be counted from the date of his regular appointment, i.e., 25.11.1971. In this view of the matter, the authorities cited by the petitioner in support of his case would not render much assistance to him.

17. On behalf of the respondent authorities, the learned Assistant Government Pleader has relied on the following authorities in support of the case of the respondent :

1. Swapan Kumar Pal And Others Vs. Samitabhar Chakraborty And Others - (2001) 5 SCC 581.

2. State of Haryana Vs. Haryana Veterinary & AHTS. Association And Another - (2000) 8 SCC 4.

3. M.K. Shanmugham Vs. Union of India - (2000) 4 SCC 476.

4. Maharashtra Vikrikar Karamchari Sangathan Vs. St. of Maharashtra - (2000) (2) SCC 552.

5. P.K. Singh Vs. Boolchand Chablani And Others - (1998) 5 SCC 726.

6. St. of Bihar Vs. Bateshwar Sharma - (1997) 4 SCC 424.

7. Shreedam Chandra Ghosh Vs. St. of Assam & Others- (1996) 10 SCC 567.

8. Food Corp. of India Vs. Thaneshwar Kalita - (1995) (3) SCC 342.

As the principles stated in the abovereferred decisions of the Hon'ble Supreme Court are well-settled, it is not necessary to discuss all these authorities here. It is,

however, necessary to refer to the recent decision of the Hon'ble Supreme Court in the case of Swapna Kumar Pal & Others Vs. Samitabhar Chakraborty, reported in (2001) 5 SCC 581, wherein the Hon'ble Court has taken the view that the ad-hoc services rendered by the respondents for different periods from 9.12.1982 till they were regularly absorbed on adjudicating their suitability by holding test, cannot be reckoned for the purpose of their seniority in the cadre of Senior Clerk. The Hon'ble Court has further held that it is true that the respondents, who got their ad-hoc promotion between the period from 9.12.1982 to 7.1.1984, were later on found suitable in the test that was held and the result of the said test was published on 28.2.1985. It is also true that they had been continuing from their respective dates of ad-hoc promotion till they were regularised, after being selected through due process. But that by itself cannot confer a right on them to claim the ad hoc period of service to be tagged on for the purpose of their seniority inasmuch as there is no provision which says that an employee on being regularly promoted, such regular promotion would date back to the date of original promotion in the cadre, which might have been on ad-hoc basis. When the service conditions are governed by a set of rules, in the absence of any rules, it cannot be held that regular promotion would relate back to the date of ad-hoc promotion itself. Even in the case of State of Haryana Vs. Haryana Veterinary AHTS Association & Anr., reported in (2000) 8 SCC 4, the Hon'ble Supreme Court has held that "a combined reading of Rules 6(3) and (4), 8, 9, 11 and 12 of the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970, framed under the proviso to Article 309 of the Constitution leads to only one conclusion that the services rendered either on an ad-hoc basis or as a stopgap arrangement, as in the present case from 1980 to 1982 cannot be held to be regular service for getting the benefits of the revised scale of pay or of the selection grade under the government memorandums dated 2.6.1989 and 16.5.1990. The appointment of R on 29.1.1982 was a fresh appointment in accordance with the statutory rules after the Public Service Commission adjudged his suitability and the regular service of R must be counted from the date he joined the post pursuant to the offer of appointment dated 29.1.1982 and the prior service rendered by him on ad-hoc basis cannot be held to be regular service nor can it be tagged on to the later service for earning the benefit under the government circular dated 2.6.1989 as well as the clarificatory circular dated 16.5.1990."

18. The ratio laid down in the above decisions squarely apply to the facts of the petitioner's case. Since the petitioner was regularly employed in accordance with the Rules prescribed on 25-11-1971, his seniority was rightly counted by the respondent authorities from that date and for correcting an error committed by the respondent authorities earlier if the seniority number of the petitioner is changed subsequently, which is in accordance with the established Rules, it cannot be said that the respondent authorities have exceeded their authority or the change effected by them is not in accordance with the provisions contained in the respective Rules.

19. It is worthwhile to mention here that Mr. C.J. Vin, the learned advocate appearing for the petitioner has placed before me, at the time of hearing of this Special Civil Application, a Notification dated 11th June 1982 issued by the Irrigation Department, Government of Gujarat, Gandhinagar, bearing No. GJ/E/10/ROS/1280(1) E-5 which, according to the petitioner, cancels all earlier rules and makes provisions with regard to the recruitment of Additional Assistant Engineer (Civil) in the Engineering Services, Division-III, falling under the jurisdiction of Irrigation Department. Mr. Vin has drawn my attention to the clause regarding the determination of seniority of the person appointed on transfer with reference to the date of his joining on temporary establishment. On the basis of this provision, he urged before me that the period for which the petitioner has worked as Supervisor (Civil) from 6.11.1969 till he was regularly appointed, should be taken into consideration for the purpose of determining his seniority. While dealing with this contention of the petitioner, it is required to note here that this Notification was neither produced along with the petition nor at any earlier point of time. The petitioner has not based his case relying on the said Notification. Even pursuant to the affidavit-in-reply filed by the respondent, the petitioner has not filed any affidavit-in-rejoinder, and it is for the first time at the time of final hearing of this matter the said Notification was produced. I am of the view that even after considering the contents of the said Notification, the same is not applicable to the facts of the petitioner's case and it would not lead the petitioner's case any further.

20. With regard to the petitioner's contention about violation of principles of natural justice, I am of the view that simply because, the mistake committed by the

respondent-authorities earlier was sought to be corrected by issuing a speaking order, it cannot be said that the order so passed is contrary to the principles of natural justice. Even otherwise, the petitioner has preferred the representation against the said order which was also rejected after considering the facts of the petitioner's case as well as relevant provisions contained in the Rules and the Resolutions framed by the Government. I, therefore, hold that there is no infirmity found in the impugned orders passed by the respondent-authorities.

21. Having considered the pleadings of the parties and arguments canvassed by the learned advocate appearing on behalf of the petitioner and the learned A.G.P. appearing on behalf of the respondent, and having also considered the authorities cited before me, I am of the view that the respondent authorities have not acted contrary to the principles of natural justice nor they have passed the order in any cryptic manner as alleged by the petitioner. The correction made by the respondent authorities in the seniority list was in accordance with the provisions contained in the respective Resolutions passed by the Government and the latter decision was correctly taken by them. Such a decision cannot be assailed in the present petition, and hence it requires no interference by this Court. The petition is, therefore, dismissed. Rule is di

as to costs.

rmr. [K.A. Puj, J.]